NATIONAL DEFENSE UNIVERSITY
STRATEGIC FORUM
INSTITUTE FOR NATIONAL STRATEGIC STUDIES

Number 166, July 1999

Humanitarian Intervention:

The Case for Legitimacy

by Charles B. Shotwell and Kimberley Thachuk

Conclusions

- There are strategic and moral advantages to expressly articulating a right c humanitarian intervention (jus ad interventionem) under international law to stop or prevent genocide or violent mass ethnic expulsions. Aside from acting as a deterrent to future threats to international peace and security, such a right to intervene may secure greater global support by seizing the moral high-ground.

- This right to intervene must be limited in purpose, scope, and means in order to prevent its abuse by hegemons and aggressors and to quell concerns that this is a carte blanche for the use of force. International law should strive for comprehensible standards in the area of humanitarian intervention and provide for predictability in rules of behavior and, thus, enhance stability. An unlimited right of intervention or war is inimical to international peace and security.

- Where feasible, the use of force should be applied in concert with pacific means o dispute settlement (Art, 33, UN Charter) and economic sanctions (Chapter VII) to halt or deter genocide (as defined by the 1948 Genocide Convention).

- The use of force may be applied when the UN Security Council is unable or unwilling to act to prevent or halt genocide and there is broad collective support for action to intervene in the otherwise sovereign affairs of the state affected. This collective support may be evidenced by a decision of the UN General Assembly or other major international representative bodies.

- The use of force must observe the customary principles of proportionality, discrimination/ humanity, and necessity by avoiding unnecessary harm to noncombatants and directing force against the actual wrongdoers.

- The intervention should end as soon as practical and sovereignty be restored to the target state, but only after reasonable assurances that the acts of genocide will not be resumed and after reserving the right to reintervene if need be.

20011005 216

Traditional Notions of Sovereignty: Non-intervention

British Prime Minister Tony Blair, in his April 22 speech in Chicago, laid out the justification for the Kosovo mission, emphasizing the need for "new rules for international cooperation," the importance of a "world ruled by law," and the necessity for reform of the UN as "the central pillar" of international cooperation and stability. By contrast, the U.S. administration has based its action primarily on the principle of collective self-defense, as embodied in Article V of the North Atlantic Charter and Article 51 of the United Nations Charter. Nevertheless, it is becoming apparent that the reliance upon collective self-defense for future actions to stop or prevent genocide will likely be problematic, either because genocide could conceivably be carried out within a nation without credibly threatening other nations, or because other nations would be reluctant to intervene without an express international legal warrant.

From the perspective of many observers, the wanton expulsions and killings by Yugoslav forces in the Kosovo province have given rise to a "humanitarian imperative" to intervene militarily, to the detriment of traditional notions of state sovereignty. From another viewpoint, intervention may be justified not by moralistic impulses, but rather by significant U.S. and alliance interests in securing peace and stability in Europe. From either perspective, it is clear that the Kosovo mission differs qualitatively from previous humanitarian missions. While the principle of the sovereign equality of states has been the underlying legal basis for the international system since the Treaties of Westphalia in 1648, recent events have led to what amounts to a serious rethinking of the strict adherence to non-intervention in the domestic affairs of states under certain circumstances. A new norm is emerging that views legitimacy of the sovereign as derived from the people; sovereignty, therefore, is forfeited by the most egregious violations of the fundamental rights of people, such as genocide. The Westphalian order is challenged by the decline of states as principal players in international life, by the rise of non-state actors, by the expansion of international business relationships, and by the increase of transnational crime, refugees, etc. The imperative that a sovereign's rights took precedence over human rights is now past its zenith. International law has been slow to catch up to this reality, but it is doing so through evolving customary practices embodied in the principled interventions in Somalia, Northern Iraq, and Kosovo. This trend against traditional notions of sovereignty is disturbing to states such as Russia, China, and India, which fear that a change to the rules could eventually lead to interventions in their internal affairs.

Despite ample treaties and conventions purporting to guarantee human rights and prevent genocide, there exists no explicit authority for humanitarian intervention. Notions of emerging international morality have provided the strongest justification for military intervention. The United Nations Charter (Article 42, Chapter VII) provides that the Security Council may authorize intervention of armed forces to "maintain or restore international peace and security." Though it addresses "threats to the peace" and "acts of aggression" rather than humanitarian disasters per se, Chapter VII powers were used by the UN Security Council to authorize interventions in Somalia, Haiti, Rwanda, and Bosnia. Operation Provide Comfort in northern Iraq had no express UN Security Council authorization, though the UN High Commissioner for Refugees participated in arrangements for a security zone for the Kurds.

The Use of Force: A Limited Right

By one view, every sovereign state retains a right to conduct war, whenever and however it pleases and for whatever reason, limited only by the effectual use of countervailing power by

adversaries. This view raises many problems in the quest for international peace and security under existing norms and international law, where there is little evidence of an unlimited "right to war" per se. Rather, international law has long supported the right of "self-defense." This can be seen in St. Augustine's Just War (Jus ad Bellum) doctrine. The Kellogg-Briand Pact of 1928 explicitly renounced the use of war as a sovereign right of nations. Not a mere quixotic exercise, this law was used as the basis for the charges of waging a war of aggression (crimes against peace) during the Nürnberg International Military Tribunal sessions, resulting in death sentences for certain members of the German High Command following World War II.

The UN Charter further reiterates the renunciation of war as a sovereign right in Article 2 (4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Essentially, the UN Charter has replaced the term war with three options: aggression (Art. 2(4)), self-defense (Art. 51), and enforcement action (Chapter VII). Some would add peacekeeping (so-called "Chapter 6 1/2" operations) to the list, though this terminology appears nowhere in the Charter.

The Historical Abuse of Intervention

Although scholars as far back as Grotius have argued for a right to use force for humanitarian intervention, there is a lack of consistent consensus (opinio juris communis) under international law. In the checkered history of humanitarian interventions, the use of force has frequently been colored by a clash of values and cultures, as seen in several examples of western and Russian interventions against the Turks: in Greece in 1827, in Syria in 1860; in Bosnia, Herzegovina, and Bulgaria in 1877, and in Bulgaria, Greece, and Serbia in 1913. Hegemons and aggressors have found "humanitarian" intervention to be a useful tool. An example of an intervention which led to growing disrepute for the doctrine was Hitler's use of force to "defend" ethnic Germans in the Sudetenland as a pretext for his invasion of Czechoslovakia. Humanitarian justifications were also used during the 1971 Indian intervention in East Pakistan, the 1978 Vietnamese intervention against the Khmer Rouge in Cambodia, the 1979 Tanzanian intervention against Idi Amin in Uganda, and the 1979 French intervention against the Bokassa regime in the Central African Republic. Until recently, Western states focused on diplomatic and economic instruments to deal with humanitarian intervention. In the 1980s, humanitarian arguments were used to justify the imposition of economic sanctions on South Africa's apartheid regime. In the 1990s, military intervention returned to vogue, beginning with the creation of a protective zone for Kurds in northern Iraq, followed by operations in Somalia and Haiti. Yet, today there are no sources that explicitly and authoritatively grant a right to humanitarian intervention. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which entered into force in 1951, provides for prosecution of violators but does not authorize armed intervention to prevent or stop genocide. Nor do the Universal Declaration of Human Rights, or the International Covenant on Civil and Political Rights, authorize humanitarian interventions.

Under customary international law, sovereign states are protected by the rule of noninterference or nonintervention: states must refrain from interfering in the domestic affairs of other states. Treaty obligations, such as the United Nations Charter (ratified by the U.S. Senate as a treaty and implemented via the UN Participation Act of 1945) also provide some guidance. Specifically, Article 2(4) of the Charter restrains members "from the threat or use of force against the territorial integrity or political independence of any state..." But sovereignty is not an absolute right, as Article 2(7) makes clear: "Nothing contained in the present Charter

shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; *but the principle shall not prejudice the application of enforcement measures under Chapter VII."* [Author emphasis] Yet it is one thing to recognize that, in case of human rights violations, sovereignty is not an absolute right (for example, it may be breached by non-military intervention, such as diplomatic and medical personnel) and quite another to breach sovereignty by the nonconsensual intervention of military forces. Chapter VII states that action of the "air, sea, or land forces as may be necessary to maintain or restore international peace and security" can be authorized by the UN Security Council under Art. 42. Articles 55 and 56 imply an affirmative obligation of member states to take joint and separate action to promote "universal respect for, and observance of, human rights and fundamental freedoms for all."

The Case of Kosovo

The United Nations cannot be relied upon in every case to authorize humanitarian intervention. The UN Security Council found the existence of a threat to peace and enjoined Serbia to reduce troops in Kosovo but did not specifically authorize the use of force. UNSC Resolutions 1199 and 1203 affirmed that the deterioration of the situation in Kosovo constituted a threat to the peace and security of the region. But unlike resolutions regarding Kuwait, Somalia, Haiti, and Bosnia, these resolutions did not authorize the use of armed forces. UNSC 1199 did call for a ceasefire in accordance with Chapter VII. UNSC 1203 demanded cooperation with the Organization on Security and Cooperation in Europe verification mission.

A UN mandate promotes international legitimacy, strengthens the evolving customary practice of humanitarian intervention, and provides an easy way around the sovereignty issue. The UN mandate largely eliminated sovereignty as an issue for military interventions in Somalia and Haiti. Historically, NATO has not needed a UN mandate when acting in self-defense under Article V of the North Atlantic Charter. Article 51 of the UN Charter recognizes that: "Nothing in the present Charter shall impair the inherent right of individual and collective self-defense ..."

NATO's Charter (Article V) incorporated the principle of self-defense ("armed attack against one or more" members in Europe or North America) via Article 51 of the UN Charter. NATO is thus legitimized as a collective self-defense organization, but it is not a collective security organization, such as the UN, nor an authorized regional arrangement to enforce international peace and security under Chapter VIII (Art. 53) of the UN Charter. Some legal scholars do not categorize the Kosovo action as a self-defense action, because there has been no armed attack within the meaning of Article V. Certain disaster relief and humanitarian actions (non-Article V missions) have been taken on by NATO armed forces in the past decade, but the use of force is a different question altogether, because, for obvious reasons, it is subject to more stringent rules. This underscores the need for a new understanding and legitimation for NATO missions and roles. Although the U.S. constitutional treatment of war powers is beyond the scope of this article, it is worth noting that international legitimation, particularly through the UN, has been a significant part of domestic U.S. legitimation. For example, the congressional resolution authorizing use of force during the Gulf War (H.J. RES. 77) began with the words: "To authorize the use of U.S. armed forces pursuant to UN Security Council Resolution 678..."

Hence, to argue that the Kosovo action is legitimate or not under international law is to miss the crucial problem altogether. The law evolves from international notions of moral conscience

that rise to the level of obligatory behavior. Such law is clearly derived from the notion of international community in which enforcement sometimes is necessary to ensure minimal standards of human dignity and decency, as recognized by civilized nations. As Jack Donnelly argues, humanitarian intervention rests on the notion that the principle of self-determination is being negated when a genocidal regime does not have the consent of the people, so the legal principle of nonintervention does not apply. One concern is that legislating intervention on humanitarian principles will only send statesmen into a flurry of activity to measure how many atrocities amount to the requisite legal standard. While such laws will serve their purpose for the odd pariah, one may argue that they will do little to oblige states to follow what is truly needed: an international standard of morality. Rather, it will be the consistent, logical, and earnest pursuit of moral principles from which customary international law will flow. It is this latter contingency that is demonstrated by the current mission in Kosovo. International law, as does domestic law, must flow from the concept of the common good. Enforcing principles of right and wrong will not instill a sense of morality; rather, such morality must derive from a sense of obligation to higher standards.

Where Do We Go from Here?

The absence of an existing right to humanitarian intervention does not deprive us of action or a remedy; but it compels us to make the case for such a right. Because customary international law evolves, new law can be created. As certain principles become accepted by sufficient nations as international law *(opinio juris communis)*, and there is general practice *(usus)* recognizing the principle as international law, the principles gradually become customary international law. A proposed strategy for promoting this evolution would entail proffering the principle for adoption by the international community as international law (much as the Anti-Personnel Landmines Ban NGOs attempted). This may be in the form of an international convention or a UN General Assembly resolution or both. Either forum is not dispositive on the matter but can act as evidence of, and lay the groundwork for, international recognition of a right to humanitarian intervention when the UN Security Council is unable or unwilling to act. This would be akin to the UNGA's Uniting for Peace Resolution of 1950, under which it took upon itself the authorization of the use of force "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security..." Through this resolution, many peacekeeping missions were authorized during subsequent years by the General Assembly rather than the Security Council. When the Soviet Union and France challenged the legality of the Congo intervention in 1960, the International Court of Justice (advisory opinion in the *Certain Expenses Case, 1962*) upheld the UNGA action.

The right of intervention must be restricted to the most egregious violations of human rights, such as genocide and violent mass ethnic expulsions. The mode and means of intervention should be likewise restricted so as to avoid even a resemblance to aggression. Both the right to resort to force *(ad bellum)* and the application of force *(in belli)* are crucial, not only to classical Just War doctrine, but to winning the "hearts and minds" campaign in the community of nations. Law is the policy tool of choice for standards to distinguish humanitarian intervention from aggression.

In the end, legal and moral legitimation carry significant political weight in the conduct of world affairs. On its most practical level, international legitimation, through articulated principles of international law, can serve to distinguish between aggression and humanitarian intervention, and provide standards of behavior for states such as Russia, India, and China, thereby

enhancing stability.

Prime Minister Blair's assertion of a need for new rules of international cooperation should be given serious thought.

Lt Col Charles B. Shotwell, USAF, is a Senior Military Fellow at INSS and an attorney (LL.M. in International Law from American University). He can be contacted at (202) 685-2220 or via e-mail at shotwellc@ndu.edu. Dr. Kimberley Thachuk is a Visiting Fellow at INSS. Opinions and conclusions expressed or implied in this paper are solely those of the authors and do not necessarily represent the views of the National Defense University, Department of Defense, or any other government agency.

The Strategic Forum provides summaries of work by members and guests of the Institute for National Strategic Studies and the National Defense University faculty. These include reports of original research, synopses of seminars and conferences,the results of unclassified war games, and digests of remarks by distinguished speakers.

Editor in Chief - Hans Binnendijk

Editor - Jonathan W. PierceNOTE

| Return to Top | Return to Strategic Forum Index | Return to Research and Publications |

Return to NDU Homepage
INSS Homepage

INTERNET DOCUMENT INFORMATION FORM

A . Report Title: Humanitarian Intervention: The Case for Legitimacy

B. DATE Report Downloaded From the Internet: 09/21/01

C. Report's Point of Contact: (Name, Organization, Address, Office Symbol, & Ph #): **National Defense University Press**
Institute for National Strategic Studies
Washington, DC 20001

D. Currently Applicable Classification Level: Unclassified

E. Distribution Statement A: Approved for Public Release

F. The foregoing information was compiled and provided by:
DTIC-OCA, Initials: __VM__ **Preparation Date 09/21/01**

The foregoing information should exactly correspond to the Title, Report Number, and the Date on the accompanying report document. If there are mismatches, or other questions, contact the above OCA Representative for resolution.